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No. 438

Supreme Court of the United States

WOMETCO TELEVISION AND THEATRE COMPANY,

Appellant,

—against—

THE UNITED STATES OF AMERICA and MIAMI BEACH THEATRE CORP.,

Appellees.

JURISDICTIONAL STATEMENT

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Appellees.

JURISDICTIONAL STATEMENT

Previous Opinions

There were no opinions delivered in the court below on either of the two orders from which this appeal is taken.

Previous opinions in this case were *U. S.* v. *Paramount Pictures, et al.*, 66 F. Supp. 323, aff'd in part, reversed in part and remanded 334 U. S. 131; *U. S.* v. *Paramount Pictures, et al.*, 85 F. Supp. 881, aff'd *sub nom.*, *Loew's Incorporated* v. *U. S.*, 339 U. S. 974.

Grounds of Jurisdiction of the Supreme Court

1. The final judgment in *U. S.* v. *Loew's Incorporated* (which is an action brought by the United States under the Sherman Act, 15 U. S. C. Secs. 1, 2), entered February 7, 1952, provided in Paragraph III 7 (b) thereof that the theatre company to be formed upon the divorcement from Loew's Incorporated of the theatres then owned by Loew's

Incorporated might petition the District Court for leave to acquire a new theatre upon showing to the satisfaction of the court and the court first finding "that the acquisition will not unduly restrain competition." Miami Beach Theatre Corp., a wholly owned subsidiary of Loew's Theatre & Realty Corporation (the New Theatre Company which was formed upon the divorcement pursuant to the terms of the judgment of February 7, 1952), petitioned the District Court pursuant to the aforesaid provision for permission to acquire a theatre in Dade County, Florida. The appellant moved for leave to intervene in the hearing, argument and determination of the said petition pursuant to Rules 24(a)(2), 24(a)(3) and 24(b)(2) of Federal Civil Procedure. The motion to intervene was denied with leave to the appellant to present argument as an *amicus curiae* and the petition of Miami Beach Theatre Corp. for leave to acquire the new theatre was granted. This appeal is taken from two orders entered in *U. S.* v. *Loew's Incorporated* 1) denying appellant's motion to intervene and 2) granting the said petition of Miami Beach Theatre Corp.

2. The order of the United States District Court for the Southern District of New York denying appellant's motion for leave to intervene was dated July 1, 1957 and was entered on July 1, 1 57 in the office of the Clerk of the United States District Court for the Southern District of New York. The order granting the petition of Miami Beach Theatre Corp. for leave to acquire and operate a theatre to be erected in Dade County, Florida, was dated July 10, 1957 and entered in the office of the Clerk of the United States District Court for the Southern District of New York on July 11, 1957. The notice of appeal from both orders was filed on July 24, 1957 in the office of the Clerk of the United States District Court for the Southern District of New York.

3. Jurisdiction to entertain these appeals is conferred on the Supreme Court by Title 15, U. S. C., Sec. 29.

4. Cases sustaining the jurisdiction of this Court to entertain the appeal from the denial of appellant's motion to intervene are:

Sutphin Estates Inc. v. *U. S.*, 342 U. S. 19;
Brotherhood of Railroad Trainmen v. *Baltimore & Ohio R. R. Co.*, 331 U. S. 519;
Allen Calculators, Inc. v. *National Cash Register Co.*, 322 U. S. 137;
Missouri-Kansas Pipe Line Co. v. *U. S.*, 312 U. S. 502.

Cases sustaining the jurisdiction of this Court to entertain the appeal from the order granting the petition of appellee Miami Beach Theatre Corp. for leave to acquire a theatre in Dade County, Florida are:

Hughes v. *U. S.*, 342 U. S. 353;
U. S. v. *United States Gypsum Co.*, 333 U. S. 364, 395;
Magidson v. *Duggan*, 212 F. 2d 748, 753, cert. denied 348 U. S. 883;
Blackhawk Hotels Co. v. *Bonfoey*, 227 F. 2d 232, 234;
Sanders v. *Leech*, 158 F. 2d 486, 487;
In re Chicago & N. W. R. Co., 110 F. 2d 425, 427.

Questions Presented by the Appeal

1. Did the District Court err in denying the motion of appellant, made pursuant to Rule 24(a)(2) of Federal Civil Procedure for leave to intervene in the hearing, argument and determination of the petition filed by appellee

Miami Beach Theatre Corp. (a wholly owned subsidiary of Loew's Theatre & Realty Corporation) to acquire a new theatre in Dade County, Florida, when the affidavit in support of said motion for permission to intervene made the following allegations:

(a) The two theatres closest to the site of the proposed acquisition and most likely to be affected thereby were operated by the appellant;

(b) In previous applications by companies subject to this and similar decrees for leave to acquire new theatres, the Government inadequately represented the interests of independent exhibitors affected thereby in that the Government had accepted the statements made by petitioners' counsel and had made no independent investigation of the facts surrounding such petitions;

(c) The appellant alleged that no independent investigation had been made by the Government in this instance also and such allegation was uncontradicted;

(d) The hearing on the application of the appellee Miami Beach Theatre Corp. was not likely to be—and in fact was not—an adversary proceeding unless permission to intervene was granted to appellant;

(e) The appellant might be bound by a finding by the District Court, which finding was in fact made, that said acquisition was not likely unduly to restrain competition if appellant attempted at a later date to invoke the jurisdiction of a Court to restrain a violation of the antitrust laws by the proposed new theatre; and

(f) No affidavit had been submitted in opposition to appellant's motion denying any of the material facts or conclusions stated in the moving affidavit.

2. Did the District Court err in denying the motion of the appellant, made pursuant to Rule 24(a)(3) of Federal Rules of Civil Procedure for leave to intervene in the hearing, argument and determination of the petition filed by appellee, Miami Beach Theatre Corp. (a wholly owned subsidiary of Loew's Theatre & Realty Corporation) to acquire a new theatre in Dade County, Florida, when the affidavit in support of said motion for permission to intervene made the following allegations:

(a) The two theatres closest to the site of the proposed acquisition and most likely to be affected thereby were operated by the appellant;

(b) In previous applications by companies subject to this and similar decrees for leave to acquire new theatres, the Government inadequately represented the interests of independent exhibitors affected thereby in that the Government had accepted the statements made by petitioners' counsel and had made no independent investigation of the facts surrounding such petitions;

(c) The appellant alleged that no independent investigation had been made by the Government in this instance also and such allegation was uncontradicted;

(d) The hearing on the application of the appellee Miami Beach Theatre Corp. was not likely to be—and in fact was not—an adversary proceeding unless permission to intervene was granted to appellant;

(e) The right of the appellant, an independent exhibitor, to operate its theatres free of an illegal conspiracy to violate the Sherman Act by Miami Beach Theatre Corp., Loew's Incorporated and other distributors was a valuable property right of appellant and would be adversely affected by the granting of the instant petition; and

(f) No affidavit had been submitted in opposition to appellant's motion denying any of the material facts or conclusions stated in the moving affidavit.

3. Did the District Court abuse its discretion in denying appellant's motion for leave to intervene under Rule 24(b)-(2) of Federal Civil Procedure under the facts set forth in "1" and "2" hereof and when the moving affidavit showed that there was a common question of fact presented by the duty cast upon petitioner Miami Beach Theatre Corp. in this proceeding to show that the proposed acquisition would not unduly restrain competition and by the burden of proof to be borne by the appellant in a contemplated action by the appellant in a private Clayton Act action to enjoin the said acquisition on the ground that it would unreasonably restrain competition under the Sherman Act?

4. Was there substantial evidence presented to the District Court to sustain the necessary finding of fact that the proposed acquisition by Miami Beach Theatre Corp. would not restrain competition when the only evidence presented to the court was the petition of Miami Beach Theatre Corp., verified by its Vice-President, which petition set forth only certain facts about the Miami Beach area, which facts had nothing to do with the distribution of motion pictures or the exhibition thereof, and the location, capacity, distance from the site of the proposed acquisition and run of certain other theatres and the conclusory allegation that the

proposed acquisition would not unduly restrain competition?

5. Was it error to grant the appellee Miami Beach Theatre Corp.'s petition for leave to acquire a new theatre in Dade County, Florida, when the right to seek this relief was contained in a judgment against Loew's Incorporated, entered on February 7, 1952, and said judgment provided as part of its overall plan to effect a complete divorcement between the film distribution and theatre exhibition interests of Loew's Incorporated that there be complete divorcement of said interests and complete divestiture by Loew's Incorporated of its interest in said theatres by February 6, 1957, and the Court having entered an order on February 4, 1957 that the requirement that Loew's Incorporated distribute the stock of Loew's Theatre & Realty Corporation owned by it be "hereby postponed until further order of this Court," so that in effect Loew's Incorporated, a producer and distributor of motion pictures, was still the ultimate beneficial owner of the stock of Miami Beach Theatre Corp. and would thereby have a substantial interest in the operation of the theatre, which said Miami Beach Theatre Corp. proposed to operate?

Statement of the Case

This appeal brings before the Court questions relating to the enforcement of a judgment entered in litigation which has been before this Court on several previous occasions and over which the District Court retained jurisdiction for several purposes including the subject matter of the petition now *sub judice*. In an opinion reported *sub nom. U. S. v. Paramount Pictures, et al.*, 334 U. S. 131, this Court approved that portion of a judgment and decree of a statutory expediting court which had found that the major dis-

tributors of motion pictures, including Loew's Incorporated, had conspired to violate the Sherman Act, but remanded the case to the District Court since the Supreme Court did not think competitive bidding for pictures alone would prevent a continuation of the practices found to be illegal. Upon remand, the District Court made additional findings of fact and conclusions of law (see Opinion, 85 F. Supp. 881) and entered a decree directing, *inter alia*, divestiture by the defendant film distributors of all their theatre interests and directing further that a plan of divorcement and divestiture be formulated and approved as to each defendant owning theatres. This decree was affirmed by the Supreme Court (see *Loew's Incorporated* v. *U. S.*, 339 U. S. 974).

Subsequent to the affirmance by the Supreme Court and on February 7, 1952 a judgment was entered against Loew's Incorporated which provided, *inter alia*, that the said defendant was to divorce itself from its theatre interests either by disposing of the said theatres to outsiders or to a New Theatre Company which was to be operated independently of Loew's Incorporated. The New Theatre Company was formed and is titled Loew's Theatre & Realty Corporation. Section V C of the February 7, 1952 judgment provided that within three years from the date of entry of said judgment, Loew's Incorporated would entirely divest itself of any ownership or interest in the stock of the New Theatre Company, which three-year period could be extended to five years from the date of the judgment.

Section III 7 (b) of the said judgment provided that after the divorcement and divestiture provisions of the judgment had been complied with, the New Theatre Company would have the right to acquire, with the court's permission, new theatres provided that it "shall show to the satisfaction of the Court, and the Court shall first find, that the acquisition

will not unduly restrain competition." A footnote to said paragraph 7 provided that, for the purposes of paragraph 7, divorcement was not to be deemed incomplete pending the completion of the divestiture procedure set forth in paragraphs C and E of Section V.

On February 4, 1957 the District Court entered an order postponing the dates provided for the "division or refinancing or stock distribution" of the New Theatre Company's interest from Loew's Incorporated "until further order of this Court."

Pursuant to the provisions of the judgment against Loew's Incorporated, Loew's Theatre & Realty Corporation has several times petitioned the District Court for leave to acquire new theatres. All of these petitions have been granted upon the recommendation of the Government. The instant petition, however, was the first one to come before the court since the indefinite postponement of the date upon which Loew's Incorporated is to divest itself of the stock of Loew's Theatre & Realty Corporation.

Miami Beach Theatre Corp.'s petition for an order permitting it to acquire a conventional theatre to be erected on Collins Avenue between 169th and 170th Streets, Sunny Isles area, Dade County, Florida, recites that the site of the proposed new theatre is about ten miles north of downtown Miami Beach and seven miles south of downtown Hollywood, Florida in an area occupied by many motels and known as "Motel Row," and it further alleges that neither petitioner nor any affiliate has any interest in any other theatre in Florida except the Riviera Theatre in South Miami and the Normandy Drive-In Theatre on the outskirts of Jacksonville. The petition then lists the theatres "closest to the proposed acquisition" giving the location, distance from the site of the proposed theatre, capacity, operator and availability date. (The availability

date of a motion picture theatre is the date on which it may play pictures pursuant to run and clearance provisions imposed against it in film license agreements.)

The petition further sets forth the names and locations of the first-run theatres in downtown Miami Beach. Except for the conclusory allegation that the proposed acquisition "will not unduly restrain competition," the petition states no other fact from which the court could or could not determine as a fact whether or not the proposed acquisition would unduly restrain competition.

The petition showed that the theatre nearest the site of the proposed new theatre was the Boulevard Drive-In Theatre which is operated by the appellant Wometco and is located three and three-tenths miles from the site of the proposed acquisition. The nearest conventional theatres are the Surf Theatre operated by the appellant Wometco, and the Normandy Theatre operated by the Claughton Circuit, another independent exhibitor, both theatres being five miles from the site of the proposed acquisition.

The appellant filed a notice of motion seeking permission to intervene in the hearing, argument and determination of the aforesaid petition of Miami Beach Theatre Corp. pursuant to the provisions of Rules 24(a)(2), 24(a)(3) and 24(b)(2) of Federal Civil Procedure. The affidavit submitted in support of this motion recited the interest of the appellant in the Boulevard and Surf Theatres and many facts to show that the hearing on the petition, if intervention were to be denied, would not be an adversary proceeding. The moving affidavit cited instances to show that in other hearings of this sort, held pursuant to the same provisions of the February 7, 1952 judgment against Loew's Incorporated, the Department of Justice "has been content to determine its stand from the petitions of the defendants herein and conversations with the defendants' attorneys

and perhaps a consideration of maps which did not begin to reveal the whole story." The reference to "defendants" was to Loew's Incorporated and its co-defendants in the main suit. The affidavit alleged that the Government had not taken steps to provide itself with the knowledge to protect the interest of either the public or independent exhibitors who would be affected by the subject matter of the petition.

The affidavit further stated that granting appellant Wometco the status of an *amicus curiae* would not be an adequate substitute for intervention, because the power of subpoena was not available to an *amicus curiae*. Wometco planned to use the power of subpoena to obtain from Loew's Incorporated and Loew's Theatre & Realty Corp. evidence which would prove that the Riviera Theatre, a theatre in South Miami operated by Loew's Theatre & Realty Corp. pursuant to permission granted in a proceeding similar to the instant one, had been restraining competition because of an illegal conspiracy between Loew's Incorporated and Loew's Theater & Realty Corp. Wometco also planned to employ subpoenas in order to determine what conversations there had been between Loew's Theatre & Realty Corp. and distributors, including Loew's Incorporated, as to the run which would be granted the proposed new theatre. The granting of the right to be heard as an *amicus curiae* was also an insufficient substitute for intervention, because the right to appeal was not available to an *amicus curiae* and an *amicus curiae* did not have the right to examine and cross-examine witnesses and adduce evidence—rights possessed by an intervenor.

The Government submitted no affidavit in opposition to appellant's motion and at no time during these proceedings either by affidavit, statement of counsel, or otherwise, did the Government indicate that it had made any inde-

pendent investigation as to whether or not the proposed acquisition would unduly restrain competition or that it had any information or knowledge on which it based its recommendation to the District Court that the petition of appellee Miami Beach Theatre Corp. be granted, except such information and facts as it received from petitioner's counsel.

At the commencement of the hearing on the petition of appellee Miami Beach Theatre Corp., the court denied the appellant's motion for intervention but permitted the appellant to be heard on the argument as an *amicus curiae*. Other than two maps, which were marked in evidence and which did nothing but visually portray the geographical position of the theatres as set forth in the petition, there was no evidence of any sort presented to the District Judge, excepting, of course, the verified petition itself.

The District Judge heard arguments of counsel. Counsel for the appellee Miami Beach Theatre Corp. in effect merely restated that which was contained in the petition. Counsel for the Government also restated that which was in the petition and added the information that "Loew's Theatres has indicated they will try to get as early a run as possible. It also indicated to the Government that, if possible, they will endeavor to get a first run for this theatre, and, if possible, a first run which may play day and date with the downtown first-run theatres for the first-run theatres in the Lincoln Road and Washington Avenue areas of Miami Beach." Counsel for the Government did not advise the court for what reason Loew's new theatre might be able to get a run which no other neighborhood theatre in Miami Beach had been able to get theretofore or what provisions would be made to insure that other theatres, competitive with Loew's new theatre would have an opportunity for the same run although it (a first run) had been theretofore denied them or what effect, if any, Loew's new theatre re-

ceiving a first run would have on restraining competition. Excepting for stating that it had learned from Loew's that the new theatre would seek a first run, the Government's argument added nothing to the contents of the petition or indicated that any investigation had been made of the subject matter thereof. The Government's counsel advised the court that "it is the view of the Government that the acquisition of this theatre by Loew's Theatres will not unduly restrain competition."

Counsel for the appellant Wometco argued to the court that in the Greater Miami area a picture had three first-run exhibitions, all of which were more or less simultaneous. Pictures played on a first run simultaneously (1) in a theatre in Miami in the downtown Flagler Street area, (2) in Miami Beach in the downtown Lincoln Road area, and (3) in Coral Gables in the downtown Miracle Mile area. Each of these areas is a principal downtown shopping area.

Until Loew's Riviera Theatre opened in South Miami (on the border of Coral Gables) in 1956, no theatre in the entire Greater Miami area, other than those located in these three downtown shopping areas, has ever been given the right either to negotiate or to bid for first-run pictures. Loew's Riviera Theatre, when it opened in a neighborhood and not in a downtown shopping area, received this right to bid against theatres in downtown Coral Gables, which right had hitherto been denied to every other neighborhood theatre in the Greater Miami area. Loew's Riviera Theatre was bidding for first-run pictures and figures were read to the court to show that Loew's Theatres was winning bids for its Riviera Theatre by making bids not warranted by the gross receipts of the theatre but by using its "long purse" in the manner which the Supreme Court in its first opinion herein foresaw and condemned as being a restraint

on competition (334 U. S. 131, 164). It was shown to the court that Loew's Riviera Theatre, a neighborhood theatre, for the period after it opened on February 16, 1956 to April 18, 1957, had been permitted to play 33⅓ of the pictures distributed by Loew's Incorporated on a first run, a much higher percentage than prevailed in the pictures distributed by any other distributor.

No theatre, other than those in the downtown Lincoln Road area in Miami Beach, has been granted the right by any distributor to negotiate for or bid for pictures on a first run in Miami Beach. It was suggested to the court by appellant's counsel that, in order to forestall granting to the new Loew theatre a privilege heretofore denied all other neighborhood theatres in the area in question and which might be denied to them in the future and to prevent a repetition of the Riviera situation, if the petition for leave to take the new theatre be granted, it be granted upon the condition that the said theatre be afforded an availability no better than that presently afforded competitive theatres in the vicinity and that the said availability could not be bettered without further leave of the court. This would give the court a later opportunity to pass on the justification for disturbing the existing pattern of distribution in favor of Loew's new theatre and ascertaining whether or not such a change was justified or was a conspiratorial effort to aid and to restrain competition in favor of Loew's new theatre.

Counsel for the appellant also argued that, since the divestiture by Loew's Incorporated of its stock in Loew's Theatre & Realty Corp. was indefinitely postponed and Loew's Incorporated would thereby have an ultimate beneficial interest in this new theatre until such divestiture, the letter and spirit of the previous judgments in this case would be best served by denying the petition without preju-

dice to a renewal thereof after the divestiture had been completed.

Substantiality of Points Raised

1. The questions raised by the denial of the appellant's motion for leave to intervene, both as of right and permissively, present matters of policy and practice which should be adjudicated by this Court. The judgments against the various defendants in *U. S. v. Paramount* who had theatre affiliates all contain provisions permitting these divorced affiliates to petition the District Court for leave to acquire new theatres and require that as a prerequisite to the granting of this petition, the said affiliate show to the court and the court find as a fact that the proposed acquisition will not unduly restrain competition. Applications pursuant to these provisions are not infrequent and are now following the same pattern as was followed in the proceedings now before the Court. The general pattern is for the petitioner to file a verified petition showing only a listing of its own theatres in the general vicinity of the proposed acquisition and the theatres of others and the conclusory allegation that the said acquisition will not unduly restrain competition. At the hearings no evidence, other than the verified petition and one or more maps visualizing the contents of the petition are presented to the court. The Government, relying on facts submitted to it by petitioner's counsel and giving no indication that it has made any independent investigation, corroborates the facts about physical locations and number of theatres, and, as in the instant case, gives the court no analysis either by way of evidence or argument as to the probable or possible effect the proposed acquisition will have on restraining competition. In so far as the petitioner and the Government are concerned, the proceeding is completely non-adversary.

It is submitted that this Court should rule on whether or not in the relaxing of a decree entered in an antitrust action brought by the Government, a private party, who will be indisputably affected by the relaxation of the decree, should be permitted to intervene, especially when it has been proven that the practice of the Government is neither to investigate nor to oppose the defendants' petitions. Unless such a policy is declared by this Court for the guidance of the District Courts, the effect of decrees entered against defendants in a Sherman Act case will be considerably diluted. This instant matter is not one where a private party seeks to intervene either to upset, change or to help formulate a decree affecting an entire industry or a large segment of an industry. It is a matter wherein a private party having a substantial financial interest which will be affected by the disposition of a petition affecting only this one situation seeks to intervene only on this one issue, and then in an instance when it is shown that the Government, the supposed vindicator of the public, is not adequately protecting the interests of either the public or of said private party. It is also a matter of urgent public policy for the Supreme Court to declare that when intervention should be allowed, granting the status of an *amicus curiae* is an insufficient substitute, because an *amicus curiae* does not have the right to present its own evidence or to examine the petitioner on its evidence.

2. The granting of the petition of the appellee Miami Beach Theatre Corp. without any substantial evidence to sustain the necessary finding of fact that the proposed acquisition will not unduly restrain competition merits plenary consideration by the Supreme Court. As has heretofore been shown, the practice has arisen of granting petitions of this sort and making the necessary finding of fact on the submission of a more or less formal petition and

no other evidence, except the maps visualizing formal allegations of the petition. If the integrity of the judgments in *U. S.* v. *Paramount*, which judgments have occupied so much of the time of the District Court and of the Supreme Court, are to be preserved, the Supreme Court will have to instruct the District Court on the minimum amount of evidence which the District Court must receive in order to make the necessary finding of fact that competition will not be restrained by a proposed acquisition. Location and ownership of theatres are insufficient facts on which to base such a finding. Runs, clearances, methods of licensing, the past history of licensing existing theatres in the area, any proposed changes in the pattern of distribution, the reasons for said changes and the effects thereof on other theatres in the area are all facts which must be considered and which should be fully explored by the District Court in passing upon the likelihood of competition being unduly restrained.

3. The Supreme Court, in its consideration of the first judgment herein (334 U. S. 131), remanded the cause for a reconsideration of the effect of vertical integration in the motion picture industry, in order to determine whether or not competition could be restored in the industry without complete divorcement of distribution and exhibition. Ultimately, this Court affirmed a judgment of the District Court (339 U. S. 974), which ordered such divestiture and divorcement as the only way of curing the monopolistic practices of the defendants. In the instant matter, Loew's Incorporated is no longer facing a deadline as to when it must divest itself of its theatre interests. Appellant is not seeking to question the order which so extended the time of Loew's Incorporated for divestiture. However, as long as said order of indefinite postponement is in effect, any new theatre acquired by Loew's Theatre & Realty Corporation or one of its subsidiaries, such as Miami Beach

Theatre Corp., is a strengthening of the position of Loew's Incorporated, the owner of all the stock of Loew's Theatre & Realty Corporation, in theatre exhibition and a continuation of the vertical integration this Court condemned and ordered extirpated. The vindication of the prior two rulings of the Supreme Court concerning divorcement of exhibition from distribution requires a review here of the order granting the petition of Miami Beach Theatre Corp.

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